UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE	§	
	§	**BANKRUPTCY CASE**
COMM SOUTH COMPANIES, INC.	§	**NO. 03-39496 HDH-11**
	§	
DEBTOR	§	

MEMORANDUM OPINION ON EMERGENCY MOTION FOR ORDER DEEMING CERTAIN ENTITIES AS NON-UTILITIES OR, ALTERNATIVELY DEEMING UTILITIES ADEQUATELY ASSURED OF FUTURE PERFORMANCE AND ESTABLISHING PROCEDURES FOR DETERMINING ADEQUATE ASSURANCE OF FUTURE UTILITY PAYMENTS

The Parties

The Debtor, Comm South, Inc., known as a competitive local exchange carrier ("CLEC"), provides local and long distance telephone service to pre-paid phone service customers. The Debtor obtains telecommunications services on a wholesale basis from Verizon and other entities known as incumbent local exchange carriers ("ILECs"), which it then sells on a retail basis to its own customers. The operating subsidiaries of Verizon Communications, Inc. ("Verizon") provide the telecommunications services to the Debtor for resale pursuant to a contract negotiated by the parties and entered into on or about September 16, 2002.

Procedure

On September 19, 2003, the Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code. The Debtor seeks the entry of an order of this Court that Verizon is not a

"utility" for purposes of § 366 of the Bankruptcy Code.[1] Verizon objected, arguing that it is a utility covered by Bankruptcy Code § 366 and that it is entitled to the special protections provided it under that provision. Thus, the issue is whether an ILEC that provides telecommunications services on a wholesale basis to a CLEC for resale to the CLEC's customers is a "utility" governed by § 366 of the Bankruptcy Code.

Utilities Covered by § 366 of the Bankruptcy Code

In determining whether Verizon should be considered a "utility" for purposes of § 366 of the Bankruptcy Code, the Court must first look to the precise language of the statute, *see, U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). Section 366 provides,

> (a) Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.
>
> (B) Such utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date. On request of a party in interest and after notice and a hearing, the court may order reasonable modification of the amount of the deposit or other security necessary to provide adequate assurance of payment.

11 U.S.C. § 366. Under this special provision of the Bankruptcy Code, any executory contract between a debtor and a utility covered by the section receives special treatment. *See, In re Tel-*

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[1]The Debtor filed an Emergency Motion for Order Deeming Certain Entities as Non-utilities or, Alternatively Deeming Utilities Adequately Assured of Future Performance and Establishing Procedures for Determining Adequate Assurance of Future Utility Payments (the "Motion").

Central Communications, Inc., 212 B.R. 342, 346 (Bankr. W.D. Mo. 1997)(noting that the bankruptcy court in *In re Gehrke*, 57 B.R. 97, 98 (Bankr. D. Or. 1985), "ruled that section 366 and not section 365 governs written agreements for the furnishing of utilities."). The utility may not exert its clout as the debtor's sole source of vital utility service to extort payment. *See generally, In re One Stop Realtour Place, Inc.*, 268 B.R. 430, 435-38 (Bankr. E.D. Pa. 2001). In exchange for such protections, however, the debtor must, early in the case, provide assurance that it will be able to pay for utility service as it goes along. *Id.*

Neither § 366 nor any other provision of the Bankruptcy Code, however, defines the term "utility." Black's Law Dictionary defines a utility as "a business enterprise that performs essential public service that is subject to government regulation." Black's Law Dictionary at 1544 (7th ed. 1999). Other cases have looked to the ordinary meaning of the term "utility" in addressing whether a particular entity is a utility for purposes of § 366. *See, e.g., In re One Stop Realtour Place, Inc.*, 268 B.R. 430, 435 (Bankr. E.D. Pa. 2001).

Clearly, Verizon, a provider of telecommunications services to the public that is regulated by the state and federal governments, is a utility. However, meeting the definition of utility in one capacity does not necessarily mean that Verizon would be a utility with respect to *this* Debtor, in *this* bankruptcy case, for purposes of § 366.

Verizon's Argument

Verizon cites the legislative history in support of its position and notes that the Debtor cites the same language in support of its position. The legislative history cited by both parties provides,

> This section is intended to cover utilities that have some special position with respect to the debtor, such as an electric company, gas supplier, or telephone company that is a monopoly in the area so that the debtor cannot easily obtain comparable service from another utility.

S. Rep. No. 95-989. Verizon points out that the legislative history indicates that § 366 is intended to cover utilities that have a "special position" with the debtor and then asserts that the Debtor's argument that Verizon does not maintain a "special position" with them is refuted by the Debtor's claims in its Motion that "the failure to maintain service from [Verizon] will cause [Comm South] to lose it going concern value" and "[w]ithout [Verizon's] ongoing service, [Comm South] will have to shut down and liquidate." Verizon Objection, ¶ 16, pp. 7-8 (citing Comm South's Motion at p. 3).

These claims of the Debtor are not contradictory of its position that Verizon is not a utility entitled to the special protections of § 366. The Debtor's position simply recognizes that Verizon is a major supplier to the Debtor, on a wholesale basis, of a commodity that the Debtor sells to its customers and that the cessation of the provision of such commodity would have a significant detrimental impact on its business. Thus, while the provisioning of telecommunications services by Verizon to this Debtor is "essential" to the continuation of the Debtor's business, the same could be said of the provisioning by a wholesaler of any commodity to any other debtor that relies on that wholesaler for a substantial percentage of the debtor's "inventory" that the debtor retails to its customers.

After reviewing the language of both the statute and the legislative history, this Court finds that § 366 addresses the provision by a public utility of an essential *service* to a debtor that is used by a debtor as a *service*. Section 366 does not address the provision by a utility of a

commodity on a wholesale basis to a debtor that is also a utility that resells that commodity to a retail customer.

Application of § 366 to Verizon?

Here, Verizon provides telecommunications services to the Debtors, not for the Debtor's own use, but for the resale by the Debtor to its customers, the end users. The contracts between Verizon and the Debtor, in fact, specifically prohibit the Debtor from using the telecommunications services provided by Verizon under the contract for its own use. Paragraph 1 of the Resale Attachment to the contract between Verizon and the Debtor provides, in part, "Verizon shall provide to Comm South, in accordance with this Agreement (including, but not limited to, Verizon's applicable Tariffs) and the requirements of Applicable Law, Verizon's Telecommunications Services *for resale* by Comm South," and ¶ 2 of the Resale Attachment provides,

> Verizon Telecommunications Services to be purchased by Comm South for other purposes (including, but not limited to, Comm South's own use) must be purchased by Comm South pursuant to other applicable Attachments to this Agreement (if any), or separate written agreements, including, but not limited to, applicable Verizon Tariffs.

Verizon's own description of its contracts with the Debtor recognizes that the Debtor's customers, not the Debtors, are the end users of the telecommunications services provided under the contract. *See,* Verizon Objection, ¶ 10, p. 5 ("The interconnection agreements between the Debtors and Verizon establish the terms, conditions and pricing under which Verizon will provide the Debtors with access to Verizon's network and under which the Debtors do resell Verizon's local telephone service *for the benefit of the Debtor's end user customers.*")(Emphasis

added). Thus, the relationship between Verizon and the Debtor is not one of utility to consumer (which would clearly be governed by § 366 of the Bankruptcy Code), but rather one of utility wholesaler to utility retailer.

In its Objection, Verizon implores the Court to "disregard the Debtors' arguments that Verizon is not a "utility" and – consistent with other bankruptcy courts throughout the country – treat the Debtors' obligations to Verizon as obligations that arise under Section 366 of the Bankruptcy Code." Verizon Objection, ¶ 5, p. 3. Verizon cites two published cases that involve orders from bankruptcy courts relating to the provisioning by an ILEC of telecommunications services to a CLEC debtor. Verizon Objection, ¶ 27, pp. 12-13 (citing, *inter alia*, *In re Tel-Central Communications, Inc.*, 212 B.R. 342 (Bankr. W.D. Mo. 1997) and *In re Sun-Tel Communications, Inc.*, 39 B.R. 10 (Bankr. S.D. Fla. 1984)). Neither of the cases, however, involved a contest of the specific issue before this Court.

In fact, Verizon's reliance on *Tel-Central* is misplaced. Verizon argues that the court in *Tel-Central* "not[ed] that it entered preliminary order finding that a telecommunications service provider was a 'utility' under Section 366 where such entity provided services to a reseller." Verizon Objection, ¶ 27, p.13. However, a closer reading of the case indicates that the court took great pains to point out that it had "for the limited purpose of establishing the security deposit, . . . *temporarily* ruled against [the ILEC] on the issue of whether [the ILEC] is a 'utility' within the meaning of section 366." *Tel-Central*, 212 B.R. at 343. The court in *Tel-Central* also noted that "[u]pon reviewing additional evidence in future proceedings the Court may find that [the ILEC] is not a utility . . . ." *Id.* at 347. It was thus not so clear to the *Tel-Central* court that an ILEC that

provides telecommunications services to a CLEC for resale, although clearly a utility in the ordinary sense of the word, would also be a "utility" covered by the special provisions of § 366 of the Bankruptcy Code.

The *Sun-Tel* case, also relied upon by Verizon, provides little support for Verizon's position. First, there is no indication in the *Sun-Tel* opinion that the issue was even contested. In *Sun-Tel*, the bankruptcy court addressed whether a security deposit that had been required of the debtor, a CLEC, for continued telecommunications services by an ILEC should be reduced based on the debtor's assertions that it could not afford to pay the deposit. For all that is apparent from the face of the opinion, the debtors could have consented at the earlier hearing (out of which the security deposit was ordered) that the ILEC in that case was a utility for purposes of § 366. Thus, the bankruptcy court's order affirming the amount of the security deposit that it had previously ordered is not particularly probative of the issue before this court: whether an ILEC should be treated as a utility for purposes of § 366 of the Bankruptcy Code when the debtor contests such treatment.

Verizon claims that "virtually all CLECs and other debtors in the telecommunications industry that obtain telecommunications services from Verizon have asserted that Verizon is a 'utility' within the meaning of Section 366." Verizon Objection, ¶ 28, p. 13. The Court has no reason to doubt that assertion. As Verizon points out, the debtors in those cases have taken such positions "in part, no doubt, because they wished to continue receiving such services from Verizon without interruption." *Id.* Verizon cited several examples of cases throughout the country where debtors have filed motions recognizing that Verizon is a "utility" covered by

Section 366 ranging from *In re Coserv* before Judge Lynn of the bankruptcy court for this district to *In re Worldcom, Inc.* in New York. However, the fact that *those* debtors *consented* to such treatment of Verizon under § 366 of the Bankruptcy Code does not, and should not, bind *this* Debtor, which, for reasons of its own, has sought an order from this Court declaring that Verizon is not a utility for purposes of § 366.

Conclusion

The plain meaning of the statute, the legislative history, and the contracts between the parties all lead to the conclusion that the relationship between the Debtor and Verizon under the contracts is not covered by Bankruptcy Code § 366. What this means for the Debtor, Verizon, and this bankruptcy case will be determined as the case proceeds. Verizon and the Debtor must look to the more general executory contract provision in § 365 of the Bankruptcy Code tempered by the stay provisions of § 362.

Based on the foregoing, the Court finds that, under the contracts at issue, Verizon is not a "utility" vis-a-vis this Debtor for purposes of § 366 of the Bankruptcy Code. The provisioning of telecommunications services by Verizon to the Debtor is pursuant to executory contracts, which are governed by § 365 of the Bankruptcy Code.

Debtor's counsel shall submit by November 21, 2003, a proposed order, agreed to by counsel for Verizon as to form, that is consistent with the Court's findings herein.

Signed this 10 day of November, 2003.

/s/ Harlin Hale

HONORABLE HARLIN D. HALE
UNITED STATES BANKRUPTCY JUDGE